Filati Lastex Elastofibre (M) Sdn Bhd v Nikseng Development Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22–95 OF 1998
BALIA YUSOF J
19 MARCH 2009

Contract — Option to purchase — Concluded contract — Whether finalised written agreement a prerequisite for exercise of option — Whether essential terms identified with sufficient clarity — Whether there was intention to formalise option — Whether formal sale and purchase agreement necessary to conclude contract

Contract — Repudiation — Whether breach of contract amounts to repudiation — Repudiation not to be lightly inferred — Whether defaulting party made intention of repudiating contract clear beyond reasonable doubt — Whether breach of non fundamental term amounted to repudiation

Contract — Specific performance — Damages in lieu of injunction and specific performance — Damages in lieu of or in addition to specific performance — Whether specific performance sufficient remedy

Contract — Specific performance — Sale and purchase of land — Exercise of option to purchase — No written sale and purchase agreement — Whether specific performance could be granted — Whether right to specific performance existed independently of written agreement — Whether granting of specific performance at sole discretion of court — Whether option validly exercised — Whether justice lay in favour of grant of specific performance

Land Law — Mortgage — Whether equity of redemption — Applicability — Equity of redemption applicable under National Land Code

Limitation — Land, recovery of — Action to recover land arising from exercise of option — Limitation period of 12 years from date on which right accrued — Limitation period started to run from moment it became clear that defendant had no intention of transferring title

By a sale and purchase agreement ('the SPA') made between the defendant

and the plaintiff, the defendant agreed to purchase a portion of land which was described in the SPA as the red portion. The said land was then sub-divided and separate issue documents of title were issued in respect of the red portion and the areas known as the green portion and the blue portion. The plaintiff also granted a loan to the defendant. Pursuant to cl 12 of the SPA, the defendant granted an option to the plaintiff to purchase the green portion, exercisable in the event of default of the defendant in the repayment of the loan. The defendant defaulted in repaying the loan and the plaintiff exercised its option pursuant to cl 12. Despite numerous requests and demands, the defendant failed to revert to the plaintiff in respect of the draft sale and purchase agreement ('the agreement') to be executed for the green portion. The plaintiff therefore filed this suit claiming that in failing to execute the agreement, the defendant had breached the agreement. The plaintiff claimed, inter alia, for specific performance of the agreement and damages in lieu of or in addition to specific performance. In its defence, the defendant, inter alia, claimed that (i) cl 12 was void; (ii) the exercise of the option was subject to the contract which never materialized; (iii) the plaintiff had breached cl 14 of the SPA in failing to deliver to the defendant the document of title for the blue portion and had thereby repudiated the SPA; and (iv) the plaintiffs' action was time barred. There option was exercised on 2 September 1989 and this suit was filed on 18 March 1998. The following issues arose for determination: (a) whether there was a valid exercise of the option; (b) whether there was repudiation of the SPA; (c) whether the plaintiff was entitled to specific performance; and (d) whether the plaintiff's claim was time barred.

Held, allowing the plaintiffs' claims in part and dismissing the defendant's counterclaim:

(1) A finalised written agreement is not a prerequisite for the valid exercise of an option. The parties to the option, the subject property and the price in relation to the sale and purchase of the green portion had been identified with sufficient clarity. The various correspondences between the parties was indicative of their intention to formalise the exercise of the option. There was a valid exercise of the option by the plaintiff (see paras 23–24). *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 followed.

(2) On the defendant's contention that cl 12 was invalid on the ground that it being a clog in the equity of redemption, the so called equity of redemption was inappropriate and inapplicable under the National Land Code (see para 25).

(3) Whether a breach of contract amounts to repudiation is a serious matter not lightly found or inferred. What has to be established is that the defaulting party has made his intention clear beyond reasonable doubt that he will no longer perform his side of the bargain. There was not an iota of evidence to suggest that the plaintiff had by any measure intimated its unwillingness to deliver the title of the blue portion to the defendant. In any event, the delivery of the said title to the defendant was not a fundamental term of the SPA and even if there was a breach of the said cl 14, such breach can never amount to repudiation. There was no repudiation of the SPA (see paras 26–27).

(4) The right to specific performance exists independently of the existence of a written agreement. That right exists in equity and it is exercised at the sole discretion of the court. The plaintiff had validly exercised the option and it was obligatory on the part of the defendant to honour the words in cl 12. Justice clearly lay in favour of the plaintiff for the grant of the relief of specific performance (see paras 28–29).

(5) Based on the facts and circumstances of the case, specific performance in itself was a sufficient remedy. An order for additional damages was refused (see para 30).

(6) This was an action to recover land arising from the exercise of the option by the plaintiff and the limitation period was 12 years from the date on which the right accrued. The plaintiff's action was well within the 12 year limitation period. The limitation period started from the moment it became clear that the defendant had no intention of transferring the title of the green portion to the plaintiff ie by late 1995 (see paras 31 & 33).

[Bahasa Malaysia summary

Menerusi satu perjanjian jual beli ('PJB') antara defendan dan plaintif, defendan bersetuju membeli sebidang tanah yang dirujuk dalam PJB sebagai bahagian merah. Tanah tersebut kemudiannya dibahagi-bahagikan dan satu dokumen hak milik yang berasingan dikeluarkan atas bahagian merah tersebut dan bahagian yang dibahagikan itu dikenali sebagai bahagian hijau dan biru. Plaintif juga memberikan pinjaman kepada defendan. Berikutan klausa 12 PJB, defendan memberi pilihan kepada plaintif untuk membeli bahagian hijau, jika defendan gagal membayar semula pinjaman tersebut. Defendan gagal membayar semula pinjaman tersebut dan plaintif membuat pilihannya berikutan klausa 12. Walau setelah beberapa permintaan dan tuntutan, defendan gagal berbalik kepada plaintif berikutan draf perjanjian jual beli tersebut (perjanjian tersebut) untuk dilaksanakan bagi bahagian hijau. Plaintif oleh itu memfailkan tindakan ini mendakwa, apabila gagal melaksanakan perjanjian tersebut, defendan telah melanggar perjanjian

tersebut. Plaintif menuntut, antara lain, perlaksanaan spesifik perjanjian tersebut dan juga ganti rugi sebagai ganti atau tambahan kepada perlaksanaan spesifik itu. Dalam pembelaannya, defendan, antara lain, mendakwa bahawa (i) klausa 12 tidak sah; (ii) perlaksanaan pilihan tersebut adalah tertakluk kepada ikatan kontrak, yang mana, kontrak tersebut tidak menjadi nyata; (iii) plaintif melanggar klausa 14 PJB apabila gagal menyerahkan dokumen hak milik bahagian biru kepada defendan dan maka, mengingkari PJB; dan (iv) tindakan plaintif dibatasi had masa. Pilihan tersebut dibuat pada 2 September 1989 dan tindakan ini difailkan pada 18 Mac 1998. Isu-isu berikut dibangkitkan bagi suatu penentuan: (a) sama ada pilihan tersebut dilaksanakan dengan sah; (b) sama ada PJB diingkari; (c) sama ada plaintif berhak atas perlaksanaan spesifik; dan (d) sama ada tuntutan plaintif dibatasi had masa.

Diputuskan, membenarkan sebahagian tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Suatu perjanjian bertulis yang mutakhir bukanlah prasyarat bagi suatu perlaksanaan pilihan itu menjadi sah. Pihak-pihak kepada pilihan tersebut, hartanah dan harga berkaitan jual beli bahagian hijau telah diperincikan dengan jelas. Daripada surat-menyurat antara pihak-pihak tersebut menunjukkan niat mereka untuk merasmikan/memformalkan perlaksanaan pilihan tersebut. Perlaksanaan pilihan oleh plaintif adalah sah (lihat perenggan 23–24). *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 diikut.

(2) Bagi hujahan defendan bahawa klausa 12 tidak sah atas dasar ia menghalang ekuiti penebusan, ekuiti penebusan tersebut tidak sesuai dan tidak boleh diguna pakai di bawah Kanun Tanah Negara (lihat perenggan 25).

(3) Sama ada satu pelanggaran kontrak mengakibatkan keingkaran merupakan persoalan serius yang tidak boleh disimpulkan dengan remeh. Apa yang perlu dibuktikan ialah pihak yang mungkir telah menyampaikan niatnya dengan jelas sekali, melampaui keraguan munasabah, bahawa dia tidak akan melaksanakan tanggungjawabnya. Tiada sekelumitpun keterangan yang menunjukkan plaintif tidak mahu menyerahkan hak milik bahagian biru kepada defendan. Walau bagaimanapun, penyerahan hak milik itu kepada defendan bukanlah satu terma penting PJB dan walau ada pelanggaran kepada klausa 14, pelanggaran itu tidak mengakibatkan kemungkiran perjanjian. Tiada kemungkiran PJB berlaku (lihat perenggan 26–27).

(4) Hak kepada perlaksanaan spesifik wujud secara berasingan dengan kewujudan perjanjian bertulis. Hak tersebut wujud dalam ekuiti dan ia

dilaksanakan semata-mata atas budi bicara mahkamah. Plaintif telah melaksanakan pilihan tersebut dengan sah dan adalah wajib bagi defendan menghormati ayat-ayat dalam klausa 12. Keadilan jelas berpihak kepada plaintif bagi suatu relief bagi perlaksanaan spesifik (lihat perenggan 28–29).

(5) Berdasarkan fakta-fakta dan keadaan-keadaan kes, perlaksanaan spesifik merupakan remedi yang mencukupi. Perintah untuk ganti rugi tambahan tidak dibenarkan (lihat perenggan 30).

(6) Ini merupakan suatu tindakan mendapatkan semula tanah yang berbangkit daripada perlaksanaan pilihan oleh plaintif dan had masa adalah 12 tahun dari tarikh hak itu terakru. Tindakan plaintif adalah dalam lingkungan had masa 12 tahun itu. Had masa bermula dari saat ia menjadi jelas bahawa defendan tiada niat menyerahkan hak milik bahagian hijau kepada plaintif, iaitu pada akhir 1995 (lihat perenggan 31 & 33).]

Notes

For cases on land, recovery of, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2331–2342.

For cases on mortgages, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3379–3383.

For cases on option to purchase, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4527–4533.

For cases on repudiation, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4694–4707.

For cases on specific performance, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5081–5153.

For cases on specific performance of sale and purchase of land, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5115–5129.

Cases referred to

Bonham Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 (folld)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (folld)

Fordeco Nos 12 & 17, The; The owners of and all other persons interested in the ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10 [2000] 1 MLJ 449, FC (refd)

Griffith v Pelton [1958] 1 Ch 205, CA (folld)

Haji Abdul Rahman & Anor v Mohamed Hassan [1917] AC 209, PC (refd)

Malayan United Finance Bhd v Tan Lay Soon [1991] 1 MLJ 504, SC (refd)

Malaysian Rubber Development Corpn Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Neylon v Dickens [1987] 1 NZLR 402 (refd)

Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291, SC (refd)
Souster v Epsom Plumbing Contractors Ltd [1974] 2 NZLR 515 (refd)
Spiro v Glencrown Properties Ltd & Anor [1991] Ch 537 (folld)
Sudbrook Trading Estate Ltd v Eggleton & Ors [1982] 3 WLR 315, HL (folld)
Tay Ah Poon & Anor v Chionh Hai Guan & Anor [1997] 2 SLR 363, CA (refd)
United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah Kota Tinggi [1984] 2 MLJ 87, PC (refd)
Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92, PC (refd)

Legislation referred to

Limitation Act 1953 s 9
Specific Relief Act 1950 ss 11(2), 18

Lim Chee Wee (Skrine & Co) for the plaintiff.
Amarjeet Singh (Zubeda & Amarjeet) for the defendant.

Balia Yusof J:

FACTS

[1] By an agreement dated 29 July 1988, ('the sale and purchase agreement') made between the defendant as vendor of the one part and the plaintiff as purchaser of the other part, the defendant has agreed to purchase a portion of the land held under land title HS (D) BP 2/84 No PT 2356 Lot 4472, Mukim Hulu Bernam Timur, Daerah Batang, Negeri Perak measuring an area of 23.22 acres which portion is more particularly described in the sale and purchase agreement as the red portion at the purchase price of RM35,000 per acre upon the terms and conditions therein contained. The said land has since been sub-divided and separate issue documents of title in respect of the red portion and the areas known as the green portion and the blue portion as described in the sale and purchase agreement.

[2] Pursuant to the sale and purchase agreement, the plaintiff has agreed to grant a loan to the defendant amounting to RM895,000 with interest thereon at the rate of ten per cent per annum as to the sum of RM300,000 and free of interest as to the sum of RM595,000 upon the security of a first legal charge over the said land which has been duly registered.

[3] In accordance with the terms and conditions of the sale and purchase agreement, the sale and purchase of the red portion has been duly completed on 4 May 1989 upon the due registration of the red portion under title HS

(D) BP 171/89 PT 2527 Mukim Hulu Bernam Timur, Daerah Batang Padang, Negeri Perak in the name of the plaintiff.

[4] Pursuant to cl 12 of the sale and purchase agreement, the defendant has granted an option to the plaintiff to purchase the green portion comprising an area of 20 acres free from encumbrances and of squatters and with vacant possession at the purchase price of RM15,000 per acre which said option shall not be exercisable except upon the default of the defendant in the repayment of the balance of the said loan together with interest accrued thereon within the period of one year from the date of the sale and purchase agreement. The said clause also provides that in the event the plaintiff shall become entitled to and shall elect to purchase the same, the plaintiff shall be entitled to set-off the purchase price from the said loan or the balance thereof (if any) outstanding and due by the defendant to the plaintiff.

[5] In default of the terms of the sale and purchase agreement the defendant has failed to repay the said loan which as at 28 July 1989 amounts to RM214,343.62.

[6] The plaintiff, through its solicitors Skrine & Co on 2 September 1989 duly exercised its option pursuant to cl 12 of the sale and purchase agreement to purchase the said green portion ('the said property').

[7] In the meantime, by a notice of appointment dated 27 February 1989 and pursuant to the terms of a debenture dated the 29 December 1982 created by the defendant in favour of Public Bank Berhad, one Encik Ahmad Kamal bin Abdullah Al-Yafii of Messrs Hanafiah Raslan & Mohamad, ('the receiver and manager') has been appointed by the chargee as the receiver and manager of all the property of the defendant comprised in or charged by the debenture. However, the directors of the defendant disputed the authority, power or otherwise of the receiver and manager to deal with, inter alia, the said property on the basis that the same had been released from the debenture upon payment of the redemption sum to the chargee. The receiver and manager had then made an application to court for directions under Originating Summons No 24–913 of 1990, inter alia, as to whether the said property had been duly released form the debenture.

[8] Pursuant to the due exercise of the option to purchase the green portion, the plaintiff through its solicitors forwarded a draft sale and purchase agreement to the receiver and manager of the defendant on or about 14 September 1989. On 31 December 1990, the plaintiff was informed by

A the receiver and manager that, pursuant to a meeting with the directors of the defendant, the directors of the defendant would execute the sale and purchase agreement with the plaintiff in relation to the sale of the said Property. The plaintiff was requested to deal with the legal firm of Messrs KK Chong Chai & Koo, the solicitors for the said directors.

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[9] By a letter dated 22 January 1991 from the plaintiff's solicitors to the defendant's solicitors, KK Chong Chai & Koo, the plaintiff informed the defendant that it had no objection to the sale and purchase agreement in respect of the said property being executed by the directors of the defendant, C as opposed to the receiver and manager, as long as the consent of the receiver and manager and a disclaimer by the chargee over the said property were obtained. However, the aforesaid request was not acceptable to the directors of the defendant.

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[10] In the meantime, the High Court has on 11 March 1992 in the Originating Summons No 24–913 of 1990 determined that the land has been duly released from the debenture upon payment of the redemption sum to the chargee and that all payments (if any) to be made under any sale and E purchase of the said land or part thereof including the said property shall be made to the directors of the defendant and not to the receiver and manager. The receiver and manager has filed an appeal against the above said decision to the Supreme Court and also made an application for stay of execution of the court order. The latter application was however subsequently withdrawn F by the receiver and manager.

[11] Following up on a previous proposal made by the receiver and manager, the plaintiff, on or about 20 July 1993 enquired to the directors of the defendant whether any monies payable in respect of the sale and purchase G of the said property can be deposited with an independent stakeholder who is mutually acceptable to both parties, pending the disposal of the receiver and manager's appeal to the Supreme Court. The defendants' solicitors replied that was not agreeable to the directors of the defendant.

H **[12]** The plaintiff accordingly asked the defendant to revert to the draft sale and purchase agreement previously forwarded to it and on or about 4 November 1993, the plaintiff through its solicitors again forwarded to the defendant the draft sale and purchase agreement for the confirmation of the defendant. As at that date, the total balance of the said loan still due and I outstanding from the defendant to the plaintiff has already exceeded the purchase price of the said property and accordingly no monies are payable by the plaintiff to the defendant in respect of the sale and transfer of the said property to the plaintiff. Despite numerous requests and demands on the part of the plaintiff through its solicitors, the defendant has failed, to revert to the

plaintiff in respect of the draft sale and purchase agreement and/or the completion of the said agreement. By a letter dated 17 April 1995 to the plaintiff's solicitors, the defendant's solicitors KK Chong Chai & Koo informed the plaintiff that they were still waiting for the final instructions of the defendant.

[13] By a letter dated 30 August 1996 from the plaintiff's solicitors to the defendant's solicitors, the plaintiff gave notice to the defendant to revert within two weeks in respect of the said property but, again, the defendant has failed, to do so. Further communication between the plaintiff's solicitors with the defendant's solicitors only results in the defendant's solicitors informing the plaintiff's solicitors that they have yet to receive their client's instructions. Since then, the parties have been trying to settle the matter amicably and it was sometime in early January 1998, that negotiations broke down. This resulted in the plaintiff filing this suit sometime in March 1998.

[14] The plaintiff claims that in failing or refusing to execute the sale and purchase agreement in respect of the said property and/or to transfer the said property to the plaintiff free of encumbrances and with vacant possession, the defendant has repudiated and/or breached the said agreement and claims for the following reliefs:

(a) specific performance of the said agreement;

(b) a declaration that the plaintiff is the beneficial owner of the said property and is entitled to the transfer of the said property;

(c) an order that the defendant do execute a transfer of the said property to the plaintiff free of all encumbrances and with vacant possession and that, in default of the defendant doing so, the registrar of this honourable court shall execute a transfer of the said property on behalf of the defendant to the plaintiff;

(d) damages in lieu of or in addition to specific performance;

(e) the sum of RM209,409.59 together with interest thereon at the rate of 10%pa for 4 May 1989 to date of final payment;

(f) interest;

(g) such further or other orders as this honourable court deems just and proper; and

(h) costs.

[15] In its defence, the defendant claims that cl 12 of the sale and purchase agreement is void and that the plaintiff has no right in law to exercise the option and alternatively the purported exercise of the option is void in law. It is also contended by the defendant that the exercise of the option is subject to the contract which never materialised and there was no concluded contract for the exercise of the said option. In the same breadth, the defendant is also contending that the plaintiff has waived its right to the option when the plaintiff sought the repayment of the loan via the plaintiffs' letter dated 2 October 1990. The plaintiff, according to the defendant has also breached cl 14 of the sale and purchase agreement in failing to deliver to the defendant the document of title for the blue portion and has thereby repudiated the said agreement, thus relieving the defendant of any further obligation under the same. Further, it is contended by the defendant that the plaintiff's action is time barred. By way of counter claim, the defendant claims to be indemnified in respect of all claims by one Calamas Sdn Bhd arising from the failure of the defendant to transfer the title in respect of the blue portion to Calamas Sdn Bhd. The defendant further sought a declaration that the sale and purchase agreement dated 29 July 1988 is void and claims for damages, interest and costs.

ISSUES

[16] The following are the issues for determination.

(1) Whether there was a valid exercise of the option as stipulated in cl 12 of the sale and purchase agreement and the validity of cl 12 itself.

(2) Whether there was repudiation of the sale and purchase agreement by the plaintiff.

(3) Whether the plaintiff is entitled to specific performance.

(4) Whether the plaintiff's claim is time barred.

THE OPTION AND CLAUSE 12 OF THE SALE AND PURCHASE AGREEMENT

[17] As can be gleaned from the facts narrated above, it is very clear that the plaintiff by issuing the letter through its solicitors Messrs Skrine & Co which is dated 2 September 1989 (exh P3A) has made clear of its intention to exercise the option given under cl 12 of the sale and purchase agreement. Following that, the plaintiff has also forwarded a copy of a draft sale and purchase agreement to the receiver and manager on 14 September 1989 (exh P3B). Even though this exercise was communicated to the receiver and manager who subsequently was declared by the High Court via order dated 11 March 1992 in Originating Summons No 24–913 of 1990 to have no

authority over the said property, the fact remains that the defendant is aware of this transaction. The defendant's directors' objection to the appointment of the receiver and manager and their authority over the said property is evident of that knowledge. Again, even as early as 15 September 1989, the defendant's solicitor Mr Patrick Koo was in the know about this exercise and as to the authority of the receiver and manager over the said property. The defendant's knowledge about the exercise of the option by the plaintiff is beyond doubt.

[18] I do not consider the objection of the defendant on the sending of the notice to exercise the option to Messrs Hanafiah Raslan & Mohamad instead of the receiver and manager personally and in the name of Encik Ahmad Kamal b Abdullah Al-Yafii has any merit. The evidence of PW3 suggests that it is the standard practice and procedure of the firm using the firm's name instead of the named receiver and manager personally. Evidence of communication between the receiver and manager with the defendant's directors about the exercise of the option, namely the sale of the Green Portion was also given by this witness and were made with Messrs Hanafiah Raslan & Mohamad. Considering the evidence of PW1 on the various communications made between the plaintiff's solicitors and the receiver and manager and with Messrs KK Chong, Chai & Koo pertaining to the draft sale and purchase agreement, it leaves no room for any doubt that negotiations were on going between the years 1989 right up to early 1998 between the plaintiff and the defendant as to the sale and purchase of the green portion.

[19] Together with the evidence of PW1 are the volumes of documents in encls 41A and 41B which has been agreed by the parties in this suit. Sieving through these documents, I can only conclude that there is more than ample evidence to prove that the defendant was going along with the plaintiff in its attempt to get the defendant to agree to the draft sale and purchase agreement for the said green portion. The House of Lords in *Sudbrook Trading Estate Ltd v Eggleton & Ors* [1982] 3 WLR 315 stated the nature of an option clause as follows:

> The option clause cannot be classified as a mere 'agreement to make an agreement.' There are not any terms left to be agreed between the parties. In modern terminology, it is to be classified as a unilateral or 'if contract'. Although it creates from the outset a right on the part of the lessees, which they will be entitled, but not bound, to exercise against the lessors at a future date, it does not give to any legal obligations on the part of either party unless and until lessees give notice in writing to the lessors, within the stipulated period, of their desire to purchase the freehold reversion to the lease. The giving of such notice, however, converts the 'if contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees.

[20] In *Griffith v Pelton* [1958] 1 Ch 205, Jenkins LJ opined that:

> An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor of purchase and to have carried to completion by the grantor, upon giving the prescribed notice and otherwise complying with the conditions upon which the option is made exercisable in any particular case.

[21] The passage was affirmed by Hoffman J in *Spiro v Glencrown Properties Ltd & Anor* [1991] Ch 537 where His Lordship held that:

> Only the grant of the option depends upon consent. The exercise of the option is a unilateral act. It would destroy the very purpose of the option if the purchaser had to obtain the vendor's countersignature to the notice by which it was exercised.

[22] From the authorities above cited it clearly point to one conclusion, that a finalised written agreement is not a prerequisite for the valid exercise of an option. On that note, the defendant's argument that since there was no concluded agreement between the two parties pursuant to the notice, there was therefore no obligation on the part of the defendant to honour the right of option granted to the plaintiff under cl 12 of the sale and purchase agreement, is therefore refuted.

[23] In *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, the Federal Court at p 335 stated:

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER (Rep) 494, where he said: Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects. *They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed an 'open contract' It is enforceable as if it was embodied in a document with all the attendant solemnity. The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant do not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed.* Rather, they are, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely formalize the agreement already concluded between the parties. (Emphasis added.)

[24] This is indeed a very pragmatic approach and I am now applying it to the instant case. Likewise the case here, there is no doubt that the parties to the option, the subject property and the price in relation to the sale and purchase of the green portion has been identified with sufficient clarity. Again, in the context of the various correspondences between the parties, it is indicative of their intention to formalise the exercise of the option. This court will not willy nilly strike it down and in turn rules that there was a valid exercise of the option by the plaintiff upon the issue of the notice as stipulated under cl 12 of the sale and purchase agreement.

[25] On the defendant's contention that clause is invalid on the ground that it being a clog in the equity of redemption, suffice it to say that the so called equity of redemption as referred to by the defendant is inappropriate and inapplicable under the National Land Code (see *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504, *Haji Abdul Rahman & Anor v Mohamed Hassan* [1917] AC 209, *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah Kota Tinggi* [1984] 2 MLJ 87). This argument certainly has no merit at all.

REPUDIATION

[26] On the issue of repudiation of the sale and purchase agreement, it is contended by the defendant that there was a breach of cl 14 of the same by the plaintiff. This, according to the defendant occurs when the plaintiff failed to deliver the title to the blue portion at the latest on 4 May 1989, that is when title to the red portion was registered in the plaintiff's name. The titles to the blue, red and green portion were issued on 18 April 1989. Title to the blue portion was only delivered to the solicitors of Calamas on 8 November 1995. By the plaintiff's failure to abide by the terms of cl 14 of the sale and purchase agreement, the defendant is of the view that the sale and purchase agreement has been repudiated. Whether a breach of contract amounts to repudiation is a serious matter not lightly found or inferred. What has to be established is that the defaulting party has made his intention clear beyond reasonable doubt that he will no longer perform his side of the bargain. Proof of such an intention requires an investigation, inter alia, of the nature of the contract, the attendant circumstances and the motives which prompted the breach (see *Chesire, Fifoot and Furmston's Law of Contract* Singapore and Malaysian Ed, 1994 by Andrew Phang Boon Loong, at p 763). Mohamed Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291, stated at p 294:

> It should be observed that not every refusal to perform some part of a contract will amount to a renunciation. Even a deliberate breach will not necessarily entitle the innocent party to treat himself as discharged, since it may sometime be that such a breach can appropriately be sanctioned by damages ... if there is an absolute

refusal to perform, the other party may treat himself as discharged. *Short of an express refusal however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that it no longer intends to be bound by its provisions. Where such an inference cannot be drawn, the innocent party will be entitled to claim damages for breach, but not a treat himself as discharged.* (Emphasis added.)

[27] Going back to the factual matrix of the case, there is not an iota of evidence to suggest that the plaintiff has by any measure intimated its unwillingness to deliver the title to the blue portion to the defendant. It delayed doing so pending the resolution of the dispute which was finally resolved via Civil Suit 22–56 of 1994 in the Ipoh High Court whereby the court ordered the delivery of the title to Calamas. To begin with, there is no specific time frame for the delivery of the title as envisaged by the said cl 14 and coupled with the fact that the defendant was under receivership and the authority of the receiver and manager over the property was also disputed by the directors of the defendant. In any event, the delivery of the said title to the defendant is not a fundamental term of the sale and purchase agreement and even if there is a breach of the said cl 14, such breach in my view can never amount to repudiation. Having considered the attendant circumstances, I therefore do not lend favour to the defendant's contention that there was repudiation of the sale and purchase agreement.

SPECIFIC PERFORMANCE

[28] The plaintiff is also seeking a specific performance of the sale and purchase of the green portion arising from the existence of a valid enforceable contract. The right to specific performance exists independently of the existence of a written agreement stipulating for its preservation. That right exists in equity and it is exercised at the sole discretion of the court (see *Tay Ah Poon v Chionh Hai Guan & Anor* [1997] 2 SLR 363). I have ruled that the plaintiff has validly exercised the option and it is obligatory on the part of the defendant to honour the words in cl 12 of the sale and purchase agreement. In cases involving immovable property such as the present one, there is presumption in favour of the grant of specific performance of the contract (s 11(2) of the Specific Relief Act 1950).

[29] Being an equitable remedy, specific performance is intended to do justice between the parties and in the circumstances of the present case, justice clearly lies in favour of the plaintiff for the grant of the relief of specific performance. Clause 12 of the sale and purchase agreement unequivocally provides the option to the plaintiff and the plaintiff has done all that was necessary to enforce its right under the said clause. For a number of years, communications and discussions were on going between the plaintiff and the

defendant on the subject matter of the sale and purchase of the green portion. The defendant has been dragging its feet for all those years with its solicitors giving the over used, ready made and well thought excuse of still trying to get further instructions from the client. The defendant cannot be allowed to go back on its own words. The defendants' conduct over the years has induced the plaintiff to believe that the defendant is willing to proceed with the transaction although may be a bit too slow. The plaintiff has earned the sympathy of this court and I accordingly order that cl 12 of the sale and purchase agreement be given its full effect in the terms that the sale and purchase of the green portion be effected.

[30] On the issue of prayer (d) in the plaintiff's statement of claim seeking for damages in lieu of or in addition to specific performance, I think s 18 of the Specific Relief Act 1950 provides a ready answer to that poser. A party's claim for specific performance together with a further or alternative claim of damages for breach of contract is a perfectly usual claim (see *Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92, *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515, *Neylon v Dickens* [1987] 1 NZLR 402). However, having considered the facts and circumstances of the case, specific performance in itself is a sufficient remedy and I shall refuse the order for additional damages.

LIMITATION

[31] It is the contention of the defendant that the action by the plaintiff is time barred. There has been a lapse of more than eight years since the date of the exercise of the option on 2 September 1989 and the date of filing the action on 18 March 1998. It has far exceeded the six years limitation period as provided in the Limitation Act 1953. It is the defendant's case that the cause of action is based on the sale and purchase agreement and in particular a breach of cl 12. If that be so, the limitation period of six years from the date of the exercise of the option on 2 September 1989 must apply. The plaintiff says otherwise and contends that s 9 of the Limitation Act 1953 should apply. I am in agreement with the plaintiff's counsel's submission that s 9 of the Act applies in the instant case. This is an action to recover land namely the green portion arising from the exercise of the option by the plaintiff and the limitation period is 12 years from the date on which the right accrued. The case of *Nasri v Mesah* [1971] 1 MLJ 32 relied upon by the plaintiff's counsel is clear authority on that point. In that case, the Federal Court held that an action for specific performance of an agreement for the sale of land or for a declaration of title to land is essentially an action to recover land. That being so, the plaintiff's action is well within the 12 year limitation period.

[32] As to the computation of the limitation period, time begins to run for purposes of limitation from the date of infringement or threat of infringement of the plaintiff's right under the agreement. Gill FJ in *Nasri v Mesah* at p 34 of the report stated:

> A cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* (1881) 8 QBD 296 at p 302). *In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement* (see *Bolo*'s case LR 57IA 325).
>
> *For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to transfer of the land.*

[33] In my view, the limitation period in this case starts to run from the moment when it becomes clear that the defendant had no intention of transferring the title to the green portion to the plaintiff. Up to late 1995, the defendant's solicitors kept on giving the same standard reply to the plaintiff that they are awaiting further instructions from the defendant's directors. The evidence of PW5 clearly indicates the 'progress' of the negotiations between the parties. At no point of time did the defendant ever question the right of the plaintiff to exercise the option. All along the way, the defendant looked intent of proceeding with the sale and purchase of the said property, although as I have said earlier much too slow. Of course the plaintiff cannot be expected to wait forever and indefinitely. In the circumstances of the case, it is reasonable to assume that by late 1995 it has become quite clear that the defendant by its conduct has shown clear indication that it is not really keen after all to transfer the green portion to the plaintiff. It is also reasonable to assume that the plaintiffs' right to the exercise of the option is being infringed or to borrow the words of Gill FJ, there is a threat of its infringement. It is upon this infringement or threat of infringement that the time or period of limitation is said to have begun. Going by this principle, the action filed the plaintiff in this case is well within the limitation period under s 9 of the Limitation Act 1953.

THE DEFENDANT'S COUNTERCLAIM

[34] In the light of what I have ruled on the exercise of the option, the defendant's counterclaim for a declaration that cl 12 of the sale and purchase agreement is void is hereby dismissed. With regard to the defendant's claim of indemnity against the plaintiff in respect of claim by Calamas Sdn Bhd against the defendant for late delivery of title to the blue portion, no sufficient evidence has been adduced by the defendant. The defendant's witness merely testified that the defendant was in breach of the court order

dated 8 February 1995 in failing to deliver the title to the blue portion to Calamas Sdn Bhd on or before 7 March 1995. The defendants' witness also stated that the defendant agreed to compensate Calamas Sdn Bhd for the loss and damage suffered by Calamas Sdn Bhd. The witness further says Calamas Sdn Bhd is seeking compensation including general damages in respect of costs of replanting trees at RM4,000 per acre for 55 acres amounting to RM220,000 and loss of income for about RM100 per acre per month. These were just figures given by the witness without any other evidence to support and substantiate the claim. There was never any action by Calamas Sdn Bhd against the defendant. This, in my view is insufficient to prove damages suffered by the defendant. It is trite that damages has to be proved. The rule in *Bonham Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 has not been met by the defendant. It is axiomatic that a party seeking damages has the burden of proving both the fact and the amount of damages before he can recover (see *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, *Malaysian Rubber Development Corpn Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569). It is for the defendant to prove his case to satisfy the court that his claim is well founded before the court grants him judgment in his claim (see *The Fordeco Nos 12 & 17; The owners of and all other persons interested in the ships Fordeco No 12 And Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10* [2000] 1 MLJ 449).

[35] Before concluding, perhaps I must also comment on the defence which relies solely on the evidence of DW1 who in turn made reference to one Patrick Koo who seem to be the main character in the whole transaction involving the transfer of the green portion. DW1 on his own admission states that he does not really play a central role in the option issue but it was the late Madam Hon Fah Tai and Patrick Koo. My perusal of the documents admitted in this proceeding indicate that they do not come from or bear the signature of DW1 but a substantial part of the communications were done through the solicitor Mr Patrick Koo. DW1 resigned as a director in 1987 and was not a director of the defendant between 1988–1998. In essence, I found the evidence of DW1 to be of not much value to bolster the defence case. I would have thought that Patrick Koo would be a material and important witness.

CONCLUSION

In conclusion, I rule that the plaintiffs' claims as prayed in paras 32(a), (b), (c) and (h) of the statement of claim are hereby allowed and the defendants' counterclaim be dismissed. As to the plaintiff's claim in para (e) in respect of the sum of RM209,409.59 together with interest thereon, both parties were called upon to make further submissions on the issue. It was submitted and rightly conceded by learned counsel for the plaintiff, Mr Lim Chee Wee that there is an element of overlapping in this claim with the claim for specific

A performance. And learned counsel agreed that should there be an order for specific performance, the plaintiffs' claim for the sum of RM209,409.59 ought not to be granted. Accordingly, I make no order as to that prayer in para (e). I also make no order as to damages in lieu of or in addition to specific performance and as to interest.

B

Plaintiff's claims allowed in part. Defendant's counterclaim dismissed.

Reported by Kanesh Sundrum

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